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JAMES H. MCKENNEY,

BRIEF.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 1[illegible]5.28

CHARLES M. TAYLOR, APPELLANT,

vs

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFFMAN, RESPONDENTS.

(19,776)

EUGENE S. IVES,

Counsel for Appellant.

IN THE

Supreme Court of the United States.

CHARLES M. TAYLOR,
Appellant.

vs.

THOS. BURNS, JNO. A. DUNCAN,
and S. R. KAUFFMAN,
Respondents.

October Term, 1905.
No. 275.

STATEMENT OF THE CASE.

The appellant brought suit in the District Court of Arizona against the respondents to quiet title to three mining claims known as the Victor, Magnet and Comet, situate in Cochise County, Arizona.

In February, 1900, the defendant, Thomas Burns, located these claims. The plaintiff, Charles M. Taylor, and his associates, after such location and prior to March, 1901, under some sort of a contract or agreement with Burns, expended a great deal of money developing these claims (Transcript, pages 48, 49 and 50). The exact nature of such contract, and the character and extent of the work done and amount of money expended upon the claims are not disclosed, the Court, upon defendant's objection, having excluded the plaintiff's testimony with respect thereto (Transcript, pages 62, 63 and 64).

On the 26th of March, 1901, the plaintiff and the defendant Burns, entered into the following contract:

"This Memorandum of Agreement, made and entered into this 26th day of March, A. D. 1901, by and between Thomas

Burns (a widower), of Cochise County, Arizona, the party of the first part, and Charles M. Taylor, of Tucson, Arizona, the party of the second part,

"Witnesseth: That the said party of the first part in consideration of the sum of one dollar lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim, situate in the California Mining District, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and consideration following, to-wit:

"The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, Forty-Five Thousand Dollars ($45,000.00) and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000.00; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000.00 and may retain out of the said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00.

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims. This contract is to take the place of and supercede any and all other contract or contracts heretofore made by said parties hereto, with reference to said mining claims.

"In witness whereof, the said parties have hereunto set their hands this 26th day of March, A. D. 1901.

"Executed in duplicate.

"(Sd) THOS. BURNS.
"(Sd) C. M. TAYLOR."

The only question involved upon this appeal is the construction to be given to this agreement. The contention of the appellant is that the document vested in him for a good and valid consideration an interest in the three mining claims.

The contention of the appellees is that the document amounts to nothing more than a power of attorney authorizing Taylor to negotiate the sale of the claims upon the terms stated in the agreement and that it is revocable at will.

It appears from the record that the trial Judge at the outset accepted the defendant's view of the document. He deemed it free from ambiguity and and excluded all evidence tending to explain or throw light upon it. To these rulings plaintiff duly accepted. If, therefore, it should be ascertained that the document either transfers to the plaintiff an interest in the claims, as the appellant will contend, or is even so ambiguous as under the rule to call for explanation by outside testimony, the judgment should be reversed. It will, therefore, be unnecessary to consider in detail the exceptions to the rulings of the Court upon evidence; for the materiality of the evidence offered and excluded depends upon the determination as to whether or not the document is ambiguous.

ARGUMENT.

I.

It is conceded, as stated by the learned Justice of the Supreme Court, in the opinion of that Court affirming the judgment of the District Court, that

> "It is a settled rule of construction of instruments of this charicter that the intention of the parties must govern as this intention is evidenced by a consideration of the entire instrument * * * That the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them."

The learned Justice, continuing, says:

> "Taking the instrument as a whole, it appears that it was intended merely as a power of attorney authorizing Taylor to effect a sale of the mines upon the terms mentioned, as the agent of Burns. Nor is this power of attorney one which in legal effect can be construed as being coupled with an interest in the mining claims, so that it cannot be revoked. There is nothing in the instrument which evidences an intention that Taylor should acquire an interest in the premises pending a sale of the same."

It is with the last quoted portion of the opinion that the appellant takes issue.

II.

The document is clumsily worded. The appellant contends, however, that it clearly expresses the intention of the parties to it to establish in each other's rights with respect to the mining claims as follows:

First and foremost: Burns was to have an interest in all of the claims to the extent of $45,000 net, prior to any interest of Taylor whatsoever.

Second: Subject to such prior interest of Burns, Taylor was to be the owner of an undivided seven-eighths interest in the premises.

Third: Subject to such $45,000 claim of Burns, Burns was to be the owner of an undivided one-eighth interest in the premises.

Fourth: In consideration of such seven-eighths interest subject to such $45,000 prior claim ,Taylor was to surrender and abandon whatever interest of any kind or character he may have had prior to the execution of the document.

Fifth: In consideration of Taylor's surrendering his rights, whatever they may have been under prior contracts, Burns was to give Taylor the right perpetually to sell the entire eight-eighths interest in the property, with the sole limitation that he should not make such sale for less than $45,000.

Sixth: The parties were in good faith to help each other to effect a sale.

In fine, the document vested Taylor with two rights:

FIRST: A seven-eighths interest subject to the $45,000 claim; and

SECOND: The right to sell, not only his seven-eighths interest, but also the one-eighth interest of Burns, at a price satisfactory to Taylor, provided the price was not less than $45,000. Burns retained his prior claim against the entire property to the extent of $45,000, but by virtue of the document was obligated to let his remaining one-eighth interest be sold at any price for which Taylor was willing to sell his seven-eighths interest.

III.

It is submitted that the above construction of the agreement gives full efficacy to every word in it and makes each portion of the agreement harmonious and consistent with all its other portions.

The language in the agreement: "The party of the first part in consideration of the sum of One Dollar * * * and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim * * * sells to the said party of the second part the said mining claims," imports absolutely the establishment in Taylor of an interest in such claims. This language cannot be disregarded unless it be ascertained to be inconsistent with other language in the agreement; and even in that event it would raise such an ambiguity as would render admissible in evidence outside testimony with respect to the intent of the parties.

As has been said, however, it is not inconsistent with any subsequent portions of the document. If there had been nothing else in the agreement, the above language would have been sufficient to assure to Taylor either an equitable or legal title to the entire mining claims, and he would have had the right to sell them or to give them away.

The succeeding paragraph of the agreement qualifies it and makes manifest the true interest intended to be transferred to Taylor.

The interest which Burns is to retain is set forth first. Whenever Taylor shall sell the mines he is to pay "Burns $45,000, and in addition thereto one-eighth of whatever price" he may be able to secure in excess of said $45,000.

It is submitted that by virtue of this clause Burns had a lien equivalent to an equitable mortgage upon the premises to the extent of $45,000, and was co-tenant with Taylor, Burns owning one-eighth and Taylor seven-eighths. This seven-eighths ownership of Taylor's was vested and indefeasible.

It could not be argued, however, that Burns was necessarily at Taylor's mercy and without remedy. It is believed that a court of equity, upon a proper showing, would have permitted Burns to foreclose his equitable mortgage or lien, or else force the payment to himself of such $45,000. The sets of facts necessary to constitute such a showing are indefinite in number and variety and need not be suggested.

IV.

"That is to say," the agreement continues, "the party of the [illegible] part is authorized to sell and negotiate the said mines for any price above the sum of $45,000, and may retain out of the said purchase price seven-eighths of said selling price above said sum of $45,000."

This paragraph makes clear the entire document. But for it Taylor could not have contracted to sell Burns' one-eighth interest and would have had no legal redress other than the ordinary suit for partition. The negotiations between Taylor and Burns consummated in this paragraph. By it the full sum of $45,000 was first assured to Burns. With that amount safe and secure, Burns agreed that Taylor might sell Burns' one-eighth along with his own seven-eighths upon any basis satisfactory to Taylor.

V.

Next in the document follows the mutual agreement that the parties will aid each other to sell the claims. They express that their mutual desire is not to equip and operate the mines, but to sell them; that their co-tenancy is not to develop into a co-partnership of mine operators. Their intent is to sell and realize "as quickly as possible." It may be remarked in this connection that had Burns asked a court of equity to foreclose his equitable interest on the ground that time had passed and nothing had been done, and no sale consummated, this clause would

have had weight with the Court in finding a rather short time to be a reasonable time.

VI.

Next the document provides:

"The party of the first part hereby agrees to execute any deed or deeds or conveyances as may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same."

The learned Justice delivering the opinion of the Supreme Court of the Territory, referring to this clause, says that "it is an admission that the instrument was not to be construed as divesting Burns of his title, and that a conveyance from him would be necessary to vest his title in any purchaser."

It would seem from this observation that the learned Justice of the Supreme Court had not studied the document with due care. Of course, it was necessary that Burns should execute a deed or deeds of conveyance. A deed signed by Taylor alone to a purchaser (granting the document to be in the nature of a conveyance), would not have conveyed such a title to the property as would have been satisfactory to any purchaser.

Burns unquestionably owned a one-eighth undivided interest. He also unquestionably owned a $45,000 interest in the claims, whatever may have been the legal nature of such interest. No purchaser would have accepted title unless Burns had joined in the conveyance. The gist of the document was that Taylor should have the absolute right in his own discretion to sell not only his seven-eighths, but also Burns' one-eighth, subject only to the $45,000 limitation. This paragraph was inserted in order to render effective such right so granted to Taylor to sell. The paragraph is not only not inconsistent with the theory that the instrument transfers an interest to Taylor, but confirms and strengthens such theory.

VII.

But one paragraph of the document remains to be considered. It is as follows:

> "This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto with reference to said mining claims."

This clause was the impulse and the consideration of the document. The nature of such contract, the Court, as has been stated, would not suffer the plaintiff to prove. The District Court and Supreme Court of the Territory both held that the document "was intended merely as a power of attorney authorizing Taylor to effect a sale as the agent of Burns" and that it was revocable at will.

It is inconceivable that such could have been Taylor's intent. If the theory of the lower courts be true, then whatever rights Taylor had prior to March 26, 1901, he threw away without consideration or necessity for so doing when he executed the document of March 26th. If revocable at will, Burns could have revoked it the next week, or the next day, and Taylor's interest was gone. To hold that Taylor intended this is, it seems to us, an absurdity.

VIII.

If the theory of the respondents and of the Arizona courts be true, Taylor's rights were those of a broker, and his interest merely a commission contingent upon his effecting a sale. Such a theory does violence to the language of the instrument.

A broker's commissions are compensation rendered for services as the agent of the owner in procuring a purchaser. Such were not the services which Taylor had performed and

agreed that he would continue to perform, and which were the consideration mentioned in the instrument.

> "The party of the first part in consideration of One Dollar * * * and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet, Comet and Victor claims," etc.

The services and labor were not to be rendered in negotiating or effecting a sale. The labor was to be expended in and upon the claims themselves. The alleged instrument of revocation was executed by Burns in 1903. Taylor was not permitted to prove what labor he had expended upon these claims either prior to March 26, 1901, or subsequent thereto, and prior to 1903. If there had been any understanding between Taylor and Burns as to what labor Taylor agreed to expend upon the claims, and Burns had felt that Taylor was not expending upon them the required amount of labor, he might have had an action of some kind or character against Taylor. He might have asked the courts to declare the instrument a conditional sale, and to decree a forfeiture. None of these matters, however, are involved in this appeal. It is not claimed that Taylor did not render full consideration.

The document itself expressly precludes the notion that the services to be rendered by Taylor as a consideration for this document were the services of a broker. The consideration of the transfer is plainly expressed without ambiguity in the clause last quoted. Burns "sells" the property in consideration of One Dollar and certain labor performed and to be performed. Subsequently in the agreement, and not as a part of the consideration for such sale, the parties mutually agree to aid each other in the negotiation and sale of the claims. Taylor was no more of a broker for Burns than Burns was for Taylor. They both agreed to negotiate a sale; neither was entitled to any commission as against the other, or any payment

for services rendered in negotiating a sale. Each was obligated to render such services and could not obtain pay therefor. The agreement establishes conclusively that both sides wanted to sell, and this mutual desire prompted the mutual agreement to render aid in negotiating or effecting a sale.

IX.

It was contended, before the lower Courts, that the granting word in this contract, viz: the word "sell," ("said Burns SELLS to said party of the second part said mining claims") is not a word of conveyance but is applicable only to personal property, and is not a word which can be used or can be construed as giving any title or right to a mining claim. This we deny. But for the Statute of Frauds, Sec. 2708 Revised Statutes of Arizona, 1901, which makes the term "real estate" under the Statute of Frauds to include mines and mining claims, mining claims could be sold orally. The Statute of Frauds requires that a contract for a sale of real estate shall be in writing, and includes mining claims, under the head of real estate in that title. This title simply provides that such contracts shall be in writing, and is not authority for the form of the document. Mining claims may be sold by bill of sale so far as that statute is concerned. It is held in:

Table Mountain T. Co. v. *Stranahan*, 20 Cal., 198.

That mining claims can be transferred orally. The Statutes of California afterwards required them to be in writing. In the absence of such a statute an oral transfer would be good. This has been also held in:

Union Con. M. Co. v. *Taylor*, 100 U. S., 37, and
Lockhart v. *Rollins*, 21 Pac., 413.

Where the statute requires a deed for a transfer of mining property, the statute would, of course, govern. The Arizona

statute of conveyance, Title XII, page 299, Sec. 1, says that no estate or freehold, etc., in land or tenements shall be conveyed unless the conveyance be declared by an instrument in writing. The other sections refer to real estate. Sec. 13 says: "The term land in this title shall include mines and mining claims."

A mining claim is not an estate of any of the Tenures known to common law. It is not an estae in fee. It is land owned by the United States, in which the United States permits citito acquire certain rights upon certain conditions. These rights so acquired, become very valuable often times, and the rights of a citizen who has complied with the acts of Congress, are as complete as though he owned in fee simple, but it is merely a license granted by the Government. "They are subject to bargain and sale." "They are property in the fullest sense of the word." "May be sold, transferred, mortgaged and inherited."

Justice Miller in:

Forbes v. *Gracey*, 94 U. S., 762,
Belk v. *Meager*, 104 U. S., 279.

says actual possession is not necessary for the protection of title acquired by valid location, it is simply the right to possession while the paramount title remains in the United States.

Such a right is transferred by the term "sell" without any regard to the character of the fee or of the title, and the word sell in a contract is a word of assignment of all the right to possession of the party who is the seller, and the ordinary words of conveyance, "grant, bargain and sell" are not required. The terms grant and bargain are not necessary, because the term of sell implies and carries with it all right of the locator to the possession of the claims.

2 *Kent's Com.* 468:—"Sale is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and to pass rights of property

for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." By this contract therefore Taylor acquired a vested interest in the mining claims. It had all the solemnities of a conveyance. It was acknowledged at the time of its execution so as to give it the right of record, and afterwards was recorded.

The words "a widower" in the very opening of the agreement, "This agreement * * * by and between Thomas Burns, a widower," are conclusive that the parties intended it to be a conveyance. If a mere agreement with a broker it would have been of no consequence whether Burns was married or not. The addition of the words "a widower" showed that the parties intended to make the instrument effective to cut off the rights of a grantor's wife, if any.

XI.

Whatever the Court may decree this instrument to be it certainly did vest in Taylor a right coupled with an interest, and, therefore, was not revocable at the will of Burns.

> *Hunt* v. *Rousmaniers Admrs.*, 8 Wheaton, 175, and also in *L. C. P. Co.*, 589.

That a power of attorney coupled with an interest is irrevocable, and binds the party giving it, and may be executed after his death, see the note to this case. Where an authorization or power of attorney is coupled with an interest, or where it is given for valuable consideration, it is from its own nature and character irrevocable.

> *Napp* v. *Alvord*, 10 Paige, 205.
> *2 Kent Com.*, 643.
> *Bony* v. *Smith*, 17 Ill., 533.
> *Raymond* v. *Squire*, 11 John. 47.

If this be true, the Court erred in holding that this document gave no right to these mining claims to Chas. M. Taylor, and in decreeing that he had no interest whatever in the same. From the findings of the Court itself, that this contract was made, executed and delivered by Burns to Taylor, and then concluding as a matter of law that Taylor had no interest in the said mining claims, and quieting the title of Burns as against Taylor and all persons claiming under, by or through him, appears an error, for which the case ought to be reversed.

XII.

If the Court should find that Taylor acquired an interest by virtue of his contract of March 26, 1901, then such interest is superior to the title alleged to have been acquired by the defendants, Duncan and Kauffman. The answers and cross-complaints of such defendants do not set forth facts sufficient to establish rights as bona fide purchasers without notice.

It was held by the United States Supreme Court in *Boone* v. *Chiles*, 10 Peters, at pages 211 and 212, that such pleading

> "must state the date of purchase, state the purpose and contents briefly, that the vendor was seized in fee and in possession. The consideration must be stated *with a distinct averment that it was bona fide and truly paid independently of the recital in the deed.* Notice must be denied previous to and down to the time of paying the money and to the delivery of the deed * * *Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice. The case stated must be made out. Evidence will not be permitted to be given of any other matter not set out * * * Such are the privileges of innocent purchasers and such the guards against those who may assume their character in courts of equity."

On this point the Supreme Court of Arizona found as follows:

> "That on February 19, 1901, defendant Burns made, executed and delivered to the defendant, John A. Duncan, a deed conveying to said Duncan an undivided one-fourth interest of, in and to the said Magnet, Comet and Victor mining claims * * * That at the date and delivery of the said deed, said Duncan had no knowledge of the instrument set forth in plaintiff's answer to defendant's cross complaint." (Transcript, Finding 4, p. 79.)

A large number of cases affirm the rule as laid down by this Court in the case of *Boone* v. *Chiles*.

> *Smith* v. *Orton*, 131 U. S., p. 78.
> *Simmons* v. *Doran*, 142 U. S., p. 437.
> Davis v. Ward, 109 Calif., 189.
> *Ferguson* v. *Dent*, 24 Fed., 435.
> *Laraway* v. *Larue*, 63 Iowa, 412.
> *Prickett* v. *Muck*, 74 Wis., 207.

It cannot be claimed that the plaintiff admitted of record that the defendant Duncan was an innocent purchaser. It appears that the counsel for the plaintiff examined the defendant, Burns, as to whether he had told Duncan of the document of March 26, 1901, and Burns answered that he had. The witness testified he told Duncan a few months after he had conveyed the one-fourth interest to Duncan.

The counsel for the plaintiff then said (Transcript, p. 39):

> "By Mr. Barnes: I find that I will have to abandon my claim against Mr. Duncan. I am satisfied that I cannot prove his actual knowledge. I thought I could by Mr. Burns, but I find that I cannot do it.

"By the Court: You dismiss as to Duncan?

"By Mr. Barnes: No, I won't dismiss; I will leave it as it is. I will say that I do not dispute his right to an undivided one-fourth interest."

It is respectfully contended that this language cannot be construed as an admission of record. The answer of Judge Barnes to the interrogation of the Court in which he said: "No, I won't dismiss," is conclusive that no admission of record was made. The observations of Judge Barnes were in the nature of an argument or discussion. It would appear that he was not familiar with the rule, and that he indicated to the Court that he did not think much of his chance of prevailing against Duncan; but when the Court, evidently familiar with the rule, did not suffer Duncan to assume the position of an innocent purchaser and asked Barnes if he dismissed as against Duncan, Barnes refused to do so.

This view of the colloquy is corroborated by a statement made by Barnes during the examination of Duncan himself. It appears at page 56 of the transcript. The counsel for Duncan offered in evidence the deed from Burns to Duncan, marked Exhibit 5. The counsel said: "We offer this deed in evidence."

"By Mr. Barnes: We admit that a deed was made, but we claim that it was subject to our interest. (Mr. Herring hands the document to Mr. Barnes.) No, no objection to that."

This occurred subsequent to the alleged admission, and is conclusive,

First: That Barnes did not admit that Duncan was an innocent purchaser; and

Second: That the counsel for Duncan was not misled by the statement which Barnes had previously made; or that if he had

been misled up to this point of the trial, this last statement of Barnes set him right.

XIII.

The Court erred in not allowing Taylor to show that contemporaneous with this contract there were executed releases of all prior obligations of Burns to Taylor and also a surrender of all powers of attorney and other documents previously held by him from Burns. All these things tend to show the magnitude of the consideration, what the consideration was, and throw light upon the purpose and intention of the document. They in no way tend to vary or affect its terms in any particular, and they were competent evidence by all the rules of evidence. See:

> *Greenleaf on Evidence*, Sec. 285, and cases cited.
> See also Sec. 304, and cases cited.

The distinction is that such evidence does not vary the contract or alter its obligations. It is rarely that the Court will see a case where there is a sharp and distinct conflict in the contention of the parties, and where the Court takes such a complete and overwhelming view of the case. The Court seemed to take it for granted that this was a mere power of attorney, and revocable, and had been revoked, and that ended it, no matter what the consideration was, and gave a construction to this document which made it a mere naked power of attorney.

If these views be correct, then all the errors assigned should be sustained, and the evidence allowed to be introduced and another trial ordered. But we insist that from the reading of the contract itself the judgment of the Court quieting Burns' title against any claim whatever of Taylor's, of any kind or character in or to these said mining claims, should be reversed, and the Court should direct a decree according to law.

EUGENE S. IVES.

Tucson, Arizona, March 13, 1906.